

**OPINION
45-183**

February 17, 1945 (OPINION)

LEGISLATIVE EXPENSES

RE: Bill Providing for Same

This is in reply to your request for an opinion from this office as to the constitutionality of House Bill No. 84, which is an act for allowance of expenses of members of the legislative assembly and making an appropriation therefor.

House Bill No. 84 provides that, "Each member of the legislative assembly of the State of North Dakota shall be entitled to, and shall receive the sum of three hundred dollars as reimbursement for his living expenses for each legislative session including the present session, the sum of three hundred dollars payable as follows: One-half of said sum payable at the end of the thirtieth day of the session and the remaining half thereof to be paid at the close of the legislative session. Said sum shall be paid in the same manner as the regular per diem of the members of the legislative assembly."

Section 2 of the bill makes an appropriation for the payment of said expenses.

Section 45 of the Constitution of North Dakota dealing with compensation of the members of the legislative assembly reads as follows: "Each member of the legislative assembly shall receive as a compensation for his services for each session, five dollars per day, and ten cents for every mile of necessary travel in going to and returning from the place of the meeting of the legislative assembly, on the most usual route."

The specific question is whether or not house bill no. 84 violates section 45 of the Constitution.

There are certain well established and fundamental rules of interpretation of the Constitution and the validity of statutes.

1. The Constitution of the State is not a grant but a limitation upon legislative power; that is, the legislature may enact any measure not prohibited specifically or by clear implication, or in violation of the Federal Constitution.
2. That where a statute is susceptible of two constructions, one which would render it valid and one which would render it invalid, the former construction should be adopted.
3. That every legislative enactment is presumed to be constitutional until it has been declared invalid by a court of competent jurisdiction.

We shall consider the question involved in the light of the foregoing rules of interpretation.

It should be noted that section 45 of the Constitution makes a specific provision for compensation for the services of the members of the legislative assembly; namely, five dollars per day. It also provides that they shall receive ten cents for every mile of necessary travel in going to and returning from the place of the meeting of the legislative assembly, on the most usual route. It is clear, of course, under the provision of this section that a member of the legislature may not be paid more than five dollars per day as compensation, nor may he be paid more than ten cents per mile for his necessary travel in going to and returning from the place of meeting. However, there is nothing in the section which either directly or indirectly prohibits the legislative assembly from enacting a measure providing for payment of the living expenses of the members while attending a legislative session, and from making an appropriation therefor. The rule that the State Constitution is a limitation and not a grant would, therefore, be applicable since said section 45 contains no inhibition against the allowance of living expenses for the members of the legislative assembly.

The legislative assembly of the State of South Dakota passed a similar statute in 1921, which was upheld by the Supreme Court of South Dakota.

The section of the Constitution of the State of South Dakota relating to compensation of members of the legislature provides: "The terms of the office of the members of the legislature shall be two years; they shall receive for their services the sum of five dollars for each day's attendance during the session of the legislature, and five cents for every mile of necessary travel in going to and returning from the place of meeting of the legislature on the most usual route. Each regular session for the legislature shall not exceed sixty days, except in cases of impeachment, and members of the legislature shall receive no other pay or perquisites except per diem and mileage."

It will be observed that the language in the South Dakota Constitution is very similar to section 45 of the Constitution of this state. However, it does provide that members of the legislature shall receive no other pay or perquisites except per diem and mileage. This provision is not in the North Dakota Constitution. It will be observed, therefore, that section 45 of our Constitution is less restrictive and does not contain the inhibitory language found in the South Dakota Constitution.

In discussing the question involved, the South Dakota Court said, "We are satisfied that the words 'for their services,' used in the first paragraph of section 6, refer to the per diem allowance, and also to the mileage allowance; and this interpretation is strengthened by the fact that in the second paragraph of the same section the words 'pay or perquisite' are used with reference to the words 'per diem and mileage'; in other words, the per diem and mileage are allowed for the services performed as 'pay and perquisites,' that is, as compensation, reward, or gain arising from the enjoyment of the office and not for the payment of expenses." (Christopherson v. Reeves, 184 N.W. 1017.)

The Supreme Court of South Dakota also upheld a statute enacted in

1921 providing for a lump sum allowance of one hundred fifty dollars per month to Supreme Court judges for expenses for moving to state capital and living at that place other than that of legal residence, notwithstanding a constitutional provision prohibiting an increase of the compensation of said judges during the term for which they were elected. (State v. Reeves, 184 N.W. 994.)

The Supreme Court of South Carolina passed on a similar question in the case of Schroggie v. Scarborough, 160 S.E. 596. The constitution of South Carolina has a provision which provides that each member of the general assembly shall receive five cents for every mile for ordinarily routed travel in going to and returning from the place where its sessions are held. No general assembly shall have the power to increase the per diem of its own members. The 1931 legislative assembly of that state enacted a measure allowing to each member of the legislative assembly the sum of two hundred sixty dollars as expenses and made an appropriation therefor. Application was made to the courts for a restraining order enjoining the treasurer from paying such expenses, and a temporary restraining order was issued by the lower court, but was dismissed by the Supreme Court, and the expenses provided for by the statute involved were ordered paid.

The Supreme Court of the State of Washington considered a similar constitutional question in the case of State v. Yelle, 110 Pac. Rep. 2d, 163, handed down in February, 1941. The Washington Constitution provides that, "Each member of the legislature shall receive for his services five dollars for each day's attendance during the session and ten cents for every mile he shall travel in going to and returning from the place of meeting of the legislature on the most usual route." The 1941 legislative session of the State of Washington enacted a measure appropriating \$40,000.00 for the actual and necessary expenses of the members of the legislature, actually expended by them for subsistence and lodging while absent from their usual places of residence in the service of the State, at the rate not exceeding five dollars per day. This was in addition to the per diem compensation and mileage. The state auditor refused to issue warrants for such expenses, and application was made to the courts for a Writ of Mandamus compelling him to issue such warrants. The matter came before the Supreme Court, and after due consideration, that Court held that the reimbursement provided for by the statute involved did not increase the compensation of the members of the legislature within the meaning of the provision of the Constitution which provided that each member of the legislature shall receive for his services five dollars for each day's attendance and ten cents for every mile of necessary travel.

It will be observed that the constitutional provision of the State of Washington providing for compensation for members of the legislature is quite similar to the provisions of section 45 of the Constitution of the State of North Dakota.

A somewhat analogous question was considered by the Supreme Court of our own state in the case of State of North Dakota ex. rel. Langer, Attorney General v. Kositzky, state auditor, 38 N.D 616. The 1917 legislative assembly of this state enacted a measure providing for the payment of five hundred dollars per annum for each of the Supreme

Court judges for traveling expenses and necessary expenditures while engaged in the discharge of official duties, to be paid in quarterly payments without filing itemized statements. The question raised was whether or not this statute was violative of section 99 of the State Constitution, which provides that the compensation of the judges of the Supreme Court shall not be increased or diminished during the term for which a judge shall have been elected. Four of the judges of the Supreme Court considered themselves disqualified and four district judges sat in their place. The opinion was written by the Honorable Charles M. Cooley, one of the district judges who sat in the case, in which it was held in substance that the statute in question providing that each judge of the Supreme Court shall receive the sum of five hundred dollars per annum for expenses, to be paid in quarterly payments without filing any itemized statement, if interpreted as providing for the payment of expenses rather than for services, was not unconstitutional as being in violation of sec. 99 of the Constitution, which provides that the compensation for the services of a judge of the Supreme Court shall not be increased or diminished during the term for which he shall have been elected.

While the opinion in this case is not directly in point, nevertheless, it is applicable to the question before us in that it distinguishes between compensation for services and expenses. House Bill No. 84 does not propose to make any allowance for compensation, but is limited strictly to reimbursement for the living expenses of the members of the legislative assembly during the session at which they are in attendance.

It is true that the Supreme Courts of other states have taken opposite views on statutes providing for expenses of members of legislative assemblies; for instance, The State of Kansas reported in 233 Pac., 510; Arkansas 261 S.W. 624; Iowa 243 N.W. 719; and others. It should be observed, however, that the constitutional provisions involved in these cases are not similar to the constitutional provision of South Dakota, Washington and the State of North Dakota in that they not only fix a specific compensation and provide for an allowance for mileage, but in addition thereto contain such other clauses as "and no more," "nothing more" or "no other compensation," which clauses are not in the Constitution of this State; consequently, these decisions are not in point, and, therefore, we do not deem it necessary to discuss them in this opinion.

Although the question may not be entirely free from doubt, nevertheless, in view of the rules of statutory construction and constitutional interpretation to which I have referred, it is the opinion of this office that house bill no. 84 is a valid enactment and not violative of section 45 of the Constitution of the State of North Dakota.

I wish to state that attorney general Johnson and assistant attorneys general A. G. Porter, C. E. Brace and C. F. Kelsch have collaborated with the undersigned in the preparation of this opinion, and that we all agree to the conclusion to which I have arrived herein.

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